United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1142

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

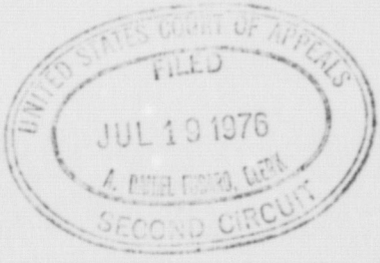
RALPH BROWN,

Defendant-Appellant.

Docket No. 76-1142

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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The Government's brief in response to Point I of appellant's brief shows a failure to understand appellant's argument. Contrary to the statement made by the Government in the footnote at 11, appellant does not claim that lack of intent, not entrapment, was the defense to the conspiracy charge; nor is it claimed that a finding of entrapment alone requires an acquittal on the conspiracy charge. Very simply, the record shows, and it is appellant's position here, that entrapment was a defense to both the substantive and the con-

spiracy charges, and that an acquittal of the conspiracy count was to be based on two defenses -- entrapment as to the January 14 transaction, and lack of intent as to the later events. The jury had to find that both defenses were present in order to acquit of conspiracy. However, by treating the conspiracy as being composed of a single act and instructing that appellant had to admit the conspiracy before entrapment could apply to the conspiracy charge, the District Judge's instruction prevented the jury from finding that appellant established both defenses.

Despite the assertion by the prosecutor at trial that the conspiracy charge consisted of more than the January 14 transaction and that the jury could convict based on the post-January 14 events if it found that appellant was entrapped into the January 14 sale (Tr. at 376-377), the Government now seeks to convert its theory of the case to a single episode version. This shift in theory is what appears to have caused the Government to find support in Sylvia v. United States, 312 F.2d 145 (1st Cir.), cert. denied, 374 U.S. 809 (1963), and United States v. DiDonna, 276 F.2d 956 (2d Cir. 1960), and to claim that Judge Cooper relied on these cases in giving his charge. However, Sylvia and DiDonna involved a crime based on a single episode. In both cases the defendant claimed lack of knowledge and entrapment about the same event. Thus, the defendants presented inconsistent defenses. Here, where it is not necessary to rule on whether it is permissible to

present inconsistent defenses to one episode* -- the District Court unnecessarily instructed that inconsistent defenses were impermissible. This instruction was unnecessary because the defenses presented were not inconsistent because they applied to different events which composed the concerted action.

The Government's misconception about appellant's argument also appears at 15 of its brief. There the Government says that appellant's claim is that Judge Cooper's charge precluded a finding of lack of intent. There is no such assertion by appellant. What was precluded by Judge Cooper's charge was a finding by the jury of both lack of intent and entrapment because Judge Cooper told the jurors that appellant had to admit the whole conspiracy in order to consider the entrapment defense at all.**

The Government next argues that appellant denied concerted conduct by not implicating or exonerating the indicted co-defendant Smith and that by denying joint activity with Smith,

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*Appellant does not concede that Judge Cooper was correct when he told the jurors that inconsistent defenses were not permissible. As in United States v. Swiderski, Doc. No. 75-1422 (2d Cir., June 11, 1976), it is simply not necessary to resolve that issue here.

**The Government argues at length that it was for the jury to decide whether appellant was being truthful. One can hardly dispute this assertion. However, the credibility determination had to be made on correct instructions, and the jurors' note to the judge clearly indicated that they wanted guidance.

appellant was precluded from claiming entrapment. The Government discounts joint conduct with some other person, arguing that no such theory was presented at trial. However, the theory was presented by the indictment, prepared by the prosecutor, which charged a conspiracy with unknown conspirators. The theory was presented at trial by appellant's own testimony. The evidence presented by appellant was sufficient to permit a finding of joint activity with someone other than Smith. MOORE'S FEDERAL PRACTICE, ¶29.05, 29-19 (1976); United States v. Goldstein, 168 F.2d 666, 670 (2d Cir. 1948); United States v. Coblantz, 453 F.2d 503, 506 (2d Cir. 1972). Even if the Government was unaware of the source of the drugs, and the source's identity remained undisclosed, the jury was surely free to accept appellant's testimony that the source existed, especially since the indictment so charged and the agents' testimony supported that of appellant with respect to his travel to the source and the representation made by appellant about the source. Thus, even on this argument, the Government's claim that the charge was correct must fail.

The instruction in both the main and supplemental charges never told the jurors how to treat the defenses as they related to the conspiracy charge. The jurors' question was most perceptive. Nonetheless, the District Court's instruction left unprotected appellant's right to have a fair consideration of his defenses.

CONCLUSION

For the above reasons and the reasons set forth in the main brief for appellant, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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